IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

FAMILY COURT APPEAL NO. 94 OF 2002
WITH
FAMILY COURT APPEAL NO. 65 OF 2003.

Shri Mukund Shankar Shinde
Occupation Service, R/at 20/7
New Type Range Hills,
Pune-411 020 ..Appellant (Orig. Petinr. in P.A.No. 1007/96 & Orig. Respdt. in P.A. No.130/96)

V/s.

Sou. Shila Mukund Shinde
Occ.Household,
R/at C/o Shri Madhukar
Dadaram Kamble, 1245
Jafrin Lane, Pune Camp, Pune-10. ..Respondent (orig. Respdt. in P.A.No. 1007/96 & orig. Petnr. in P.A.No. 130/96)

Shri Madhukar Jamdar with Mr. Hemant Ghadigaonkar for the appellant.

None for the respondent.

CORAM : R.M.S. KHANDEPARKAR &
ANOOP V.MOHTA, JJ.

DATE : 02/8/ 2005.

ORAL JUDGMENT (PER ANOOP V. MOHTA,J.)

. The appellant-husband has preferred these two appeals against the common judgment and decree, dated 31/12/2000, passed by the learned Judge, Family Court No.2, Pune, in Petition A No. 130/1996, filed by the respondent-wife under section 9 of the Hindu Marriage

Act (for short H.M.Act) for restitution of conjugal rights and P.A.No. 1007/1996 filed by the appellant-husband for divorce on the ground of cruelty under section 13(1)(ia) of the H.M. Act. In the result the application filed by the respondent-wife against the appellant-husband for restitution of conjugal right has been allowed and the apellant-husband is directed to resume cohabitation with the petitioner forthwith. The petition filed by the appellant-husband for divorce was dismissed. The appellant-husband has been directed to pay maintenance at the rate of Rs. 1000/- per month for the respondent-wife and maintenance of Rs. 750/- per month for daughter Meenakshi and son Nikhil each from the date of order till cohabitation is resumed. Therefore, this appeal only by the appellant-husband.

2. The learned Judge held that the respondent-wife proved that the appellant-husband has without any reasonable excuse withdrawn himself from her society. The appellant-husband has no reasonable cause to live separately from the respondent-wife. The appellant-husband failed to prove that the respondent-wife treated him with cruelty. The respondent-wife is entitled to a decree for restitution

of conjugal rights. The respondent-wife is not entitled for permanent alimony. The interim maintenance is only till cohabitation is resumed, as appellant-husband has been directed to resume cohabitation with the respondent-wife forthwith. The learned Judge has also held that there is bar under section 23 of the H.M.Act to pass a decree against the appellant-husband. The learned Judge has considered the pleadings and the evidence led by the parties in support of their respective contentions. Apart from the documents on the record, the respondent-wife led the evidence of herself and her sister, brother Prabhakr and Dipti Kamble, sister-in-law of the respondent. The respondent wife examined her sister Ranjanabai Kamble. The appellant-husband examined himself and one Shobha Bhosale, his cousin. As per the record, the conciliation failed, as settlement was not possible (Exh.57).

3. Heard learned Counsel appearing for the appellant-husband. He contended that the impugned judgment and decree is contrary to the evidence on the record and the appellant-husband is entitled for the decree of divorce on the ground of cruelty as

contemplated under section 13(1)(ia) of the H.M.Act. The interim maintenance pending the cohabitation ought not to have been granted, as the petition for divorce was dismissed. None appeared for the respondent-wife.

4. As the parties are common and the impugned judgment is also common therefore, we are disposing of these two Family Court Appeals by this common judgment by maintaining the impugned judgment on the following counts.

A. The cause of action arose on 12/8/1995, when the appellant-hysband after respondent's second delivery did not take the respondent-wife to Range Hills, Khadki at her matrimonial home.

B. The appellant-husband denied even paternity to the newly born child and went away without meeting the respondent-wife who was hospitalised for the delivery. On 12/8/1995, when the respondent-wife discharged from the hospital and went to his Range hills house along with her brother and sister, she found th locked house locked. She thereafter, stayed with a niece for more than one and half months. The appellant-husband has

admitted that he did not take any steps to take respondent-wife to his residence at Range Hills Khadki from her monther's house. The appellant-husband failed to bring on the record any cogent evidence that the respondent-wife left the house of his mother at her own accord.

C. On the contrary, respondent-wife had examined her sister and she deposed that after one and half months Kalavati sister of respondent-wife against reached Shila to her house, which remained unchallenged. There is nothing on the record to prove that the respondent-wife had withdrawn from the company of appellant-husband without any reasonable cause.

D. The appellant-husband also failed to prove or brought on the record any material in this regard and also on the grounds of cruelty of which incidents are referred. The first incident was referred of the year 1992, whereby, there was a dispute of the appellant with his own mother and therefore, the appellant-husband left the mother's house. Therefore, the respondent-wife has never insisted to live separately from his family but the appellant-husband for whatever may the reason, left

his mother's place and living in the said house at Range Hills, for more than 3-1/2 to 4 years. In the evidence, the appellant-husband admitted that he visited his mother only once in a 5 months. Therefore, the appellant failed to prove and or brought on record anything to support his case that the respondent-wife was the main cause to compel him to shift from the mother's house. Therefore, it cannot be said to be the incident of sudden provocation to leave the society of the parties. The second cruelty incident that the respondent-wife used to threat him to end life by sprinkling kerosene and set herself on fire and to entangle him in some criminal cases, But there is no supporting evinced to prove the said ground of cruelty or allegations except words against words. The first incident of cruelty which was referred was of dated 11/11/1991, the marriage took place on 17/11/1991. The incident of self immolation prior to the date of marriage is unacceptable. To support the case of cruelty of the appellant, he did not lodge the complaint against the respondent-wife about the aforesaid period. Except the statement that he had gone to the police station to lodge the complaint, there is nothing on the record to show contrary when both the parties had stayed

together happily for at least one year at Range Hills. Therefore, in absence of any evidence, allegations of threat is difficult to accept and and also the reason that the appellant husband unable to cohabit with the respondent wife.

E. the appellant-husband. The learned Judge has also found various contradiction and omissions in the pleadings and deposition of the appellant-husband, specially in regarding to the allegations of demand of an amount from the family of the appellant by the respondent's family, before the marriage Th respondent wife asked to believe in the black magic and on its refusal, she quarrled with the appellant=husband. This is also not sufficient ground for cruelty.

F. It appears from the evidence as, well as the reasoning given by the learned Judge that the basic instance's of the threat and the alleged incident's of cruelty are of the year 1992 at Range Hills. They were residing from November, 1992 to July, 1995 happily. Therefore, now taking shelter of these allegations of cruelty of the year 1995, are not sufficient and believable grounds for the divorce. The Petition for

divorce was filed on 20/12/1996. There is no justification on the record to file said divorce petitioner after one and half year. With this back-ground of delay in filing the application, these allegations ranging the period from October 1991 to July 1995, are unacceptable and required to be rejected.

G. **IN REFERENCE TO MAINTENANCE ISSUE:-** As per the respondent's petition, affidavit and her case, based on the evidence on the record, she was willing and ready to cohabit with the husband. The appellant-husband has refused to cohabit and this resulted into filing of an application for the maintenance for herself and their children, who are taking education in primary Schools. In support of the same there is an ample evidence on the record to show the need of the respondent and their children and the income of the appellant-husband. The learned Judge, therefore, after considering the evidence led by the parties on the issue of grant of the maintenance, has rightly granted the amount of Rs. 2500/- per month for her i.e. at the rate of Rs. 1000/- for respondent-wife and Rs.750/- for each child, from the date of order dated 31/12/2000 till the cohabitation is resumed. The respondent wife as

observed not earning anything and she has no job to earn. The appellant-husband's salary is of Rs. 6129/- per month without any deduction and he can earn additional Rs. 1300 to 1400/- per month, as overtime. There is also evidence that the appellant-husband owns 2 hectors and 65 acres of the agricultural lands having 1/5th share in the same. He is looking after those agricultural lands. In view of this background, we see no reason to interference with the orders passed by the learned Judge on both the counts.

H. The learned Advocate appearing for the appellant-husband also challenged the grant of maintenance by contending that once the petition for divorce of the husband is dismissed, the maintenance under section 25 of Hindu Marriage Act cannot be granted. In support of this submission, he has relied on **2000(1) Mh.L.J. 713 (Vishnu B. Mayekar V. Laxmi V. Mayekar).** The cas**e** as cited V.B. Mayekar (Supra) is distinguishable on facts itself. There was no application under section 9 of H.M. Act for restitution of conjugal rights filed in the said matter. In the present case, apart from the petition by the husband for the divorce. As per the impugned judgment, the

appellant-husband has been directed to cohabit with the respondent-wife forthwith and pending the said cohabitation the grant of maintenance, on the application under section 24 of H.M. Act cannot, be said to be without jurisdiction. By the order dated 15th October, 1996, the learned Judge had in fact passed the order of interim maintenance and it was subsequently enhanced by the impugned judgment. There was no challenge raised at any point of time by the appellant-husband on this count. Therefore, we see there is no reason to interfere with the order passed by the learned Judge granting maintenance till the co-habitation in question. By the impugned judgment the permanent alimony as claimed was rejected as the divorce petition filed by the appellant-husband was dismissed. In this background, we are of the view that Vishnu Mayekar (Supra), the judgment of this Court nowhere support the case of the appellant-husband. Therefore, on this reason also the impugned judgment and order is confirmed.

I. The learned Judge therefore, has rightly rejected the appellant-husband’s petition for divorce.

The learned Judge is right in granting the order of restitution of conjugal rights under Section 9 of H.M. Act to the respondent-wife and directed the appellant-husband to resume cohabitation with the respondent-wife. The order of maintenance as referred above in view of above reasoning, is correct and need no interference.

5. In view of aboe reasonings, both the appeals are dismissed. No order as to cost.

[R.M.S. KHANDEPARKAR, J.]

[ANOOP V. MOHTA, J.]